No. 22,337

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRICKLAYERS & MASONS INTERNATIONAL UNION,
LOCAL NO. 3, AND
FRANK S. LLEWELLYN, SECRETARY,

Respondents.

**On Petition
for Enforcement of an Order of the
National Labor Relations Board**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GLEN M. BENDIXSEN,
RICHARD S. RODIN,
Attorneys.
National Labor Relations Board.

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order

(R. 41, 30-31)[1] issued against Bricklayers & Masons International Union, Local No. 3, and Frank S. Llewellyn, Secretary (hereinafter referred to as "respondents" or "the Union") on December 30, 1966. The Board's decision and order are reported at 162 NLRB No. 46. This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[2] the unfair labor practices having occurred in Spokane, Washington. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that respondents violated Section 8(b)(3) of the Act by insisting to impasse upon the inclusion of a non-mandatory subject of bargaining in its contract with the employer after agreement had been reached on all other items of bargaining. The facts upon which this finding was based are summarized below.

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[1] References to the pleadings reproduced as "Volume I, Pleadings," are designated "R." References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The pertinent statutory provisions are reprinted, *infra*, p. A-1-A-3.

A. Background: Bargaining history of the parties

The Associated General Contractors of America is a national employers' association. The Eastern Washington Builders Chapter is a Spokane affiliate (hereafter referred to as "AGC"), comprised of employers engaged as contractors in the building and construction industry in the States of Washington, Idaho and Oregon (R. 21). The Mason Contractors Association, Spokane Chapter No. 855 (hereafter "MCA") is an association of employers engaged in masonry and bricklaying in the construction industry in the same geographical area as AGC (R. 22-23; G.C. Exh. 7). On February 21, 1962, AGC and MCA, acting jointly as employers, entered into a collective bargaining agreement with the Union (R. 23; G.C. Exh. 6).[3] The agreement stated that it would remain in effect until December 31, 1964, at which time it would be terminated, modified, or amended upon proper notice (*Ibid.*). On October 28, 1964, the Union sent written notification of a desire to terminate the existing contract and to meet in order to negotiate a new agreement (R. 23; Tr. 22, G.C. Exh. 2). On October 30, 1964, AGC acknowledged receipt of this notice and informed the Union that it was willing to meet and negotiate a new agreement as the Union had requested (R. 23; Tr. 23, G.C. Exh. 3).

In November or December 1964, MCA notified AGC that it wished to negotiate its own contract with the Union rather than negotiating jointly with AGC as they had done in the past

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[3] The two employer associations had bargained jointly since 1958 or 1959. Before this time, AGC had bargained alone with the Union for some six or seven years (R. 38-39; Tr. 38-39).

(R. 23; Tr. 25). Immediately after receiving this notice from MCA, Charles Hively, Executive Secretary of AGC, informed respondent Llewellyn, Secretary of the Union, that AGC wanted to negotiate with the Union after conclusion of the negotiations with MCA[4] (R. 23; Tr. 25-26, 27).

B. The contract negotiations between AGC and the Union; an impasse reached on a contract provision

On about February 1, 1965, MCA and the Union reached an agreement on their contract (R. 24; Tr. 40, G.C. Exh. 7). Upon being informed of this fact, Hively requested a meeting with Secretary Llewellyn and Otho Hood, president of the Union, in order to negotiate AGC's contract (R. 24; Tr. 26, 28). The meeting was held on February 11, at which time Llewellyn and Hood told Hively that the Union's contract with MCA was the same, but for a change in wages, as their 1962 contract (R. 24; Tr. 27-28). The Union's new contract with MCA, however, contained the following provision (R. 24; G.C. Exh. 7):

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[4] Shortly thereafter, on January 25, 1965, the national association authorized AGC to merge with the other Spokane chapter, which was comprised of contractors in highway and heavy construction work. Accordingly, the members of AGC assigned their bargaining rights to the single chapter, called the Inland Empire Chapter of the Associated General Contractors (herein "Inland Empire"). Hively became assistant executive director of Inland Empire (R. 23-24, 40-41; Tr. 20-22, 37-38, 68-75, Resp. Exh. 1).

Article VI – OTHER EMPLOYERS

SECTION 1. The Union agrees that during the life of this Agreement they will not furnish members to any Employers other than those parties to this agreement, under conditions more favorable to such Employers than those herein established.

SECTION 2. The Employer agrees that in the contracting or sub-contracting of any work coming within the jurisdiction of this Union the Employer shall do business only with a person, firm or corporation party to this agreement.

SECTION 3. In the event the Employer violates this Article he shall pay the Union a sum equivalent to the initiation fees and dues the Union would have received for each employee not included in this bargaining unit, had this article been complied with under the Union security provision of this Agreement.

Hively stated that AGC would not accept the provision contained in Article VI, Section 3 of the MCA contract (R. 24; Tr. 28-29). About February 19, 1965, and at various times thereafter, Hively notified Llewellyn that AGC was willing to enter into a contract with the Union identical to the MCA contract except for the Article VI, Section 3 provision. There was no disagreement by the parties on any other provision in the contract (R. 25; Tr. 32-33).

On July 9, 1965, Hively wrote to Llewellyn in order to "make clear [AGC's] desire to conclude as speedily as possible a new agreement to replace the agreement in accordance with the opening letter from [the Union], dated October 8, 1964" (R. 25; G.C. Exh. 4). Hively's letter added that AGC

has consistently refused to accept contract provisions which included the language of Article VI, Section 3 since it considered such a provision to be an unlawful "exclusion of fair competition in our area." (*Ibid.*). On July 16, 1965, Llewellyn sent a reply to Hively stating that the Union would be glad to meet with representatives of AGC in an effort to resolve the differences between them concerning the new contract (R. 25; G.C. Exh. 5).

On July 22, 1965, Hively and Llewellyn discussed the matter again and each acknowledged that the only issue between them involved Article VI, Section 3 of the proposed contract (R. 25; 83-84). Llewellyn insisted that the provision was legal while Hively maintained that it was not (R. 25; Tr. 84). Finally, Hively again informed Llewellyn that the AGC was prepared to sign the agreement only if Article VI, Section 3 was omitted (R. 25; Tr. 84).

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board concluded that the damages provision insisted upon by the Union was a non-mandatory subject of bargaining and that the Union's insistence to impasse upon the inclusion of this provision in the contract violated Section 8(b)(3) of the Act (R. 38, 30). The Board's order requires the Union to cease and desist from insisting that AGC, or its successor, Inland Empire, accept this particular provision of the contract as a condition precedent to its entering into a collective bargaining agreement (R. 41, 30). Affirmatively, the order requires the Union to bargain, upon request, with AGC or Inland Empire, and, if an understanding is reached, embody such an understanding in a signed contract without requiring AGC or Inland Empire to agree to

the inclusion of the disputed contract provision. The Union is further ordered to post the appropriate notices (R. 41, 30-31).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(3) OF THE ACT BY INSISTING TO IMPASSE UPON THE INCLUSION OF A NON-MANDATORY SUBJECT OF BARGAINING IN ITS CONTRACT WITH THE EMPLOYER AFTER AGREEMENT HAD BEEN REACHED ON ALL OTHER ITEMS OF BARGAINING

A. Introduction

The law is well settled that neither the employer nor the union may condition willingness to negotiate or to contract about matters which are within the area of compulsory bargaining upon the other party's acceding to demands which are outside that area. As the Supreme Court stated in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349:

> Read together, these provisions [Sections 8(a)(5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment.' The duty is limited to those subjects, and within that area

> neither party is legally obligated to yield. *Labor Board v. American National Insurance Co.*, 343 U.S. 395. As to other matters, however, each party is free to bargain or not bargain, and to agree or not to agree.
>
> The Company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

In the instant case, as set forth *supra*, pp. 5-6, Hively, on behalf of the employer-members of AGC, and the Union had agreed, but for Article VI, Section 3, on all the terms of a new collective bargaining agreement covering the bricklayers and masons represented by the Union.[5] The disputed contract

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[5] Insofar as Secretary Llewellyn and President Hood denied that the negotiations with Hively concerned the bricklayers and masons, and involved only a discussion regarding tilelayers and terrazzo employees also represented by the Union, the Trial Examiner discredited their testimony. The Board adopted these findings (R. 24, 37). It is well settled that the resolution of conflicting testimony is the responsibility of the Trial Examiner and the Board; their determinations ordinarily will not be disturbed by a reviewing court. *N.L.R.B. v. Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Anderson*, 206 F. 2d 409 (C.A. 9), cert. denied, 346 U.S. 938. We submit that the Trial Examiner's credibility resolutions, adopted by the Board, are entitled to affirmance here.

clause provided that any signatory employer who subcontracted work within the Union's jurisdiction to a nonsignatory employer would pay the Union a sum equivalent to the initiation fees and dues the Union would have received from each employee deprived of unit work by reason of the subcontracting. On July 22, 1965, an impasse was reached in the bargaining negotiations when the Union insisted on the inclusion of this clause in the contract.[6] Thus, the principal issue presented here is whether a contract provision of this sort is subject to the bargaining obligation established by Section 8(d) of the Act, or whether it constitutes a non-mandatory subject of bargaining about which neither party may require the other to yield. For if such a provision is a non-mandatory subject of bargaining, it follows under *Borg-Warner* that the respondents violated Section 8(b)(3) by their insistence upon the inclusion of the provision in the contract. As was said in *International Longshoremen's Ass'n v. N.L.R.B.*, 277 F. 2d 681, 683 (C.A. D.C.), "The right of the Union to urge a non-mandatory subject of bargaining ceases short of ultimate insistence." As we now show, the Board's finding that the contract provision insisted upon by respondents was a non-mandatory subject of bargaining has ample support in the law.

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[6] The Board (R. 29 n. 14) rejected the General Counsel's contention (R. 4-5) that an earlier impasse on July 9, 1965, was established by AGC's letter of that date to the Union, indicating a willingness to sign an agreement if the disputed provision was omitted (see, *supra*, pp. 5-6).

The original charge leading to the complaint was filed on May 21, 1965, and amended on September 1 (R. 3-4). The Union asserted that no unfair labor practice could be based on events occurring after the original charge. Under settled law, this assertion is without merit. *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301. See also *N.L.R.B. v. Anchor Rome Mills, Inc.*, 228 F. 2d 775, 779 (C.A. 5).

B. The damages provision insisted upon by the Union constituted a non-mandatory subject of bargaining

The Board, with the approval of this Court and other reviewing courts, has consistently held that a union violates Section 8(b)(3) of the Act by insisting, as a condition precedent to executing a collective bargaining agreement, that the employer agrees to post a bond or its equivalent to afford security against possible defaults. *N.L.R.B. v. International Hod Carriers, Building and Common Laborers Union of America, Local No. 1082*, 384 F. 2d 55 (C.A. 9) (Ely, J., dissenting), *cert. denied* __U.S. __ ; *N.L.R.B. v. Laborers & Hod Carriers Local No. 300*, 384 F. 2d 1000 (C.A. 9). And see, *Excello Dry Wall Co.*, 145 NLRB 663, enforced *sub nom. Carpenters District Council of Detroit v. N.L.R.B.*, 58 LRRM 2064 (C.A. D.C.): *Local 164, Brotherhood of Painters v. N.L.R.B.*, 293 F. 2d 133 (C.A. D.C.), cert. denied, 368 U.S. 824; *International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB 972, 978-979, aff'd on other grounds *sub nom. Rabouin v. N.L.R.B.*, 195 F. 2d 906 (C.A. 2). Similarly, an employer's insistence upon a performance bond or a like provision on the part of the Union is violative of Section 8(a)(5). See, *N.L.R.B. v. American Compress Warehouse, Div. of Frost-Whited Co.*, 350 F. 2d 365 (C.A. 5), cert. denied, 382 U.S. 982; *N.L.R.B v. Davison*, 318 F. 2d 550 (C.A. 4); *N.L.R.B. v. F.M. Reeves & Sons, Inc.*, 47 LRRM 2480 (C.A. 10), cert. denied, 366 U.S. 914, adjudging the employer in civil contempt of 273 F. 2d 710; *N.L.R.B. v. Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), cert. denied, 342 U.S. 824. Here, the action of the Union – insisting upon a contract provision requiring payment by AGC to the Union of certain sums of money in the event AGC violated the subcontracting clause – falls squarely within the rationale of these cases.

As the above cases make clear, the plain language of the statute establishes that the Union's contract provision, as with performance bond provisions, is beyond the scope of mandatory collective bargaining. Section 8(d) of the Act, defining the bargaining obligations of the parties under the Act, requires bargaining with respect to "terms and conditions of employment," not guarantees running to one party in the event the other commits a breach of contract. Such guarantees bear only an attenuated relation to the "actual performance of work." *Local 164, Brotherhood of Painters v. N.L.R.B., supra*, 293 F. 2d at 135. Moreover, that "Congress [under Section 301 of the Act] has provided a remedy to be available in the event of a breach of contract" indicates that provisions designed to insure performance have been excluded from the area of mandatory collective bargaining. *Local 164, Brotherhood of Painters v. N.L.R.B., supra.*

Surely the contract provision here extends beyond the ambit of "terms and conditions of employment" in the same manner as the performance bond clauses which uniformly have been held non-mandatory subjects of bargaining. All are "security devices," imposing on the employer in the event of a breach of contract a form of sanction having little to do "with the actual performance of work or to subsequent relations." *Local 164, Brotherhood of Painters v. N.L.R.B., supra*, 293 F. 2d at 135. Moreover, payment to the Union of a sum of money equivalent to the dues and initiation fees which the Union would have received but for a breach of the subcontracting clause is primarily "related to security for the contracting party rather than relating to a benefit or security for the employees." *N.L.R.B. v. Davison, supra*, 318 F. 2d at 556. Such guarantees of financial redress for a contract breach do not concern "terms and conditions of employment" of the members of the bargaining unit within Section 8(d) and the

rationale of *Borg-Warner*. This is true, as the Board held, "[w]hether that provision be considered a performance bond . . . or as a 'liquidated damages' clause, as claimed by the Union" (R. 41). See *International Hod Carriers, Building and Common Laborers Union of America, Local 1082 v. N.L.R.B.*, *supra*, 384 F. 2d at 56.[7] In sum, the Board's holding that the Union's contract proposal is not a mandatory subject of collective bargaining is correct and in accord with prior decisions of the Board and the courts. Accordingly, the Union's insistence on the inclusion of such a clause is violative of Section 8(b)(3) of the Act.

C. Section 8(f) is inapplicable in the instant case

Before the Board, the Union asserted that the bargaining here, conducted between an employer engaged primarily in the building and construction industry and a union representing

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[7] Nor is the instant holding in conflict with the views set forth in Judge Ely's dissenting opinion in *International Hod Carriers*, cited above. Under the rationale of that opinion, whether any contract provision is within the range of Section 8(d) "should depend upon the nature and scope of the [provision] in a given case." 384 F. 2d at 61. As the performance bond provision provided assurance that "payment of wages and fringe benefits . . . would continue to flow without interruption" (384 F. 2d at 61-62), Judge Ely reasoned that it tied in so closely with those payments that it came within "terms and conditions of employment," and therefore was a mandatory subject of bargaining. As shown, the contract provision in the instant case bore no such relation to the employees' "terms and conditions of employment" – it is simply a sanction, with the benefit running to the Union's coffers, in the event that the employer breached the subcontracting clause in the contract.

employees engaged in that industry, is subject to the provisions of Section 8(f) of the Act (see *infra*, pp. A1-A2). According to the Union, the parties were negotiating a "prehire" contract within the intendment of that section and, since bargaining for such agreements is voluntary by both the employer and the union, the bargaining obligations imposed by Sections 8(a)(5) and 8(b)(3) respectively have no application. The Board found, however, that the pre-hire provision in Section 8(f) is inapplicable in the circumstances presented here. The record evidence and the legislative history of Section 8(f), we submit, fully support the Board's finding.

As set forth *supra*, p. 3), AGC recognized and began negotiating contracts with the Union in 1952. After 1958 or 1959, AGC and MCA bargained jointly with the Union. In February 1962, AGC and MCA jointly entered into a collective bargaining agreement with the Union, which continued in effect until December 31, 1964, subject to a 60-day reopening provision. Pursuant to this provision, the Union gave notification of its desire to terminate the existing contract and to negotiate a new agreement. On February 1, 1965, MCA, having decided to bargain separately, negotiated a new contract with the Union. That contract, but for the wages and the damages provision in dispute here, was similar to the previous MCA and AGC joint agreement.

AGC notified the Union of a willingness to sign an agreement identical to the new MCA contract except for the disputed provision. In discussions during the spring and summer of 1965, AGC renewed its contract offer. The Union refused to accept the successor agreement unless it contained the disputed provision.

In short, it is clear that AGC and the Union were negotiating a new contract to extend a bargaining relationship which the two parties had shared for some 13 years. It is this

continuing bargaining relationship which distinguishes the instant case from the situation which Congress intended to be encompassed under the provisions of Section 8(f) of the Act. That section reflects congressional appreciation of the unique industrial practices in the construction industry. Those practices often make it unrealisitc to require strict aherence to the statutory limitations on forming a bargaining relationship either informally or in a Board election. The contractor, for example, may need to obtain a labor agreement immediately upon, or even before, securing the construction contract and hiring his work force. The agreement, moreover, may subsist only for the duration of the project work. Congress sought to accommodate these and other industry practices to the statutory prohibition against recognizing and bargaining with a union until a representative number of employees are hired, and a majority of them have selected the union. Section 8(f)(1) provides that the labor agreement shall not be considered unlawful because "the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of the agreement. . . ." (*infra*, p. A-1). This clause permits, by allowing "prehire agreements," the creation of a bargaining relationship in circumstances which would be unlawful in other industries.

Thus, the above clause of Section 8(f) was to apply when a contractor and a union first enter into a labor agreement. As the Board noted (R. 39-40) the legislative history of Section 8(f) demonstrates that Congress was primarily concerned with validating initial attempts to create a bargaining relationship in circumstances where a timely and meaningful representation election could not be conducted. See 1 & II *Legislative History of the LMRDA of 1959* (GPO), pp. 424-425, 763, 777, 945-946, 1074, 1082-1083, 1715. House Speaker Rayburn, in a speech endorsing the bill, indicated

how Section 8(f)(1) eliminated the need of proving majority status in the beginning stages of the bargaining relationship (*id.* at 1578). In the Senate, then Senator John F. Kennedy explained that under the section the contractual bargaining relationship could be entered into without a showing of majority status "because of the inability to conduct representation elections in the construction industry." (*id.* at 1715). See also *N.L.R.B. v. Local 542, Operating Engineers*, 331 F. 2d 99, 105-106 (C.A. 3).

These considerations which led Congress to permit prehire agreements, however, "have no meaning in the situation where, as here, the parties are continuing an existing bargaining relationship under which employees previously have been hired" (R. 39). The Union had been the chosen bargaining agent of bricklayers and masons used by AGC's members for many years. The parties had maintained an uninterrupted contract relationship, which included union security provisions assuring union membership. There is, in other words, no uncertainty here as to the Union's representative status or the propriety of the present bargaining relationships. No reason existed, therefore, to view the parties' bargaining for a successor agreement as purely "voluntary" negotiations for a prehire agreement within the intendment of Section 8(f)(1). Accordingly, as the Board concluded, "the tests to be applied in determining the bargaining obligations of the parties herein are those generally used under Section 8(a)(5) and 8(b)(3) . . ." (R. 40).[8] Accord: *Island Construction Co. Inc.*, 135 NLRB 13, 14-16; *Local 3, I.B.E.W., AFL-CIO*, 153 NLRB 717, 724-725, enforced 362 F. 2d 232, 236 (C.A. 2).

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[8] In view of this holding, the Board did not adopt the Trial Examiner's conclusion (R. 27-29) that the usual bargaining obligations attach to negotiations for a prehire agreement under Section 8(f)(1). The Board held it was unnecessary to resolve this question (R. 40).

To avoid this application of the statute, the Union asserted that a "continuing" bargaining relationship with AGC was not in existence during the 1965 negotiations. The Board properly rejected, as wholly lacking in substance, the two grounds put forth in support of this contention.

As shown, in 1965 MCA elected not to continue bargaining jointly with AGC in negotiations with the Union. However, MCA's decision, which resulted in AGC's negotiating separately with the Union, plainly did not interrupt the Union's history of bargaining for over a decade with AGC as the spokesman of its employer-members. AGC and the Union had bargained separately for several years preceding joint negotiations. The return to separate negotiations did not alter the nature or continuity of the bargaining relationship. The union continued to represent, as before, employees of the members in the two employer associations, both of whom continued to speak for their respective members. Whether AGC and MCA acted jointly in particular negotiations had no bearing on the bargaining relationships. This merely determined whether, as a facet of the mechanics of bargaining, the employers would speak through a joint or single spokesman at the bargaining table. See *Hoisting & Portable Engineers Local Union No. 701, Operating Engineers, AFL-CIO*, 141 NLRB 469, 470-471. Compare *Detroit Newspaper Publishers Association, et al. v. N.L.R.B.*, 372 F. 2d 569, 572 (C.A. 6); *Publishers' Assoc. of New York City, et al. v. N.L.R.B.*, 364 F. 2d 293, 296 (C.A. 2), *cert. denied*, 385 U.S. 971.

Similar considerations warranted rejection of the claim that the bargaining history was destroyed by AGC's merger with the other Spokane chapter of the national association of contractors, to form a single chapter (Inland Empire). As set forth *supra*, p. 4, n. 4, AGC members assigned their bargaining rights to Inland Empire. AGC's negotiator, Hively,

became an official of Inland Empire and continued to negotiate with the Union. Hively discussed the merger with Union representatives during negotiations, and made clear that he was fully authorized to continue speaking for the former AGC members (Tr. 37). The Union fully understood, and tendered no objections. AGC members, in sum, effectively passed on their bargaining rights and obligations when AGC merged into Inland Empire. In these circumstances, the successorship of Inland Empire did not alter the existing bargaining relationship. *Hoisting & Portable Engineers, etc., supra,* 141 NLRB at 473, n. 7; *Morgan Linen Service,* 131 NLRB 420, 421-422. Accord: *N.L.R.B. v. Downtown Bakery Corp.,* 330 F. 2d 921, 925 (C.A. 6); *Retail Clerks Int'l Ass'n v. N.L.R.B.,* 373 F. 2d 655, 657 (C.A. D.C.); *International Union, Progressive Mine Workers v. N.L.R.B.,* 319 F. 2d 428, 435 (C.A. 7), modification of Board's order reversed, 375 U.S. 396.

D. The Board's policy of not establishing one-man bargaining units has no application here

The record does not show that the contractors in AGC hired more than one unit employee during the 1965 period when negotiations were taking place. As a result, according to the Union, under the Board's policy of not establishing one-man bargaining units the contractors had no statutory bargaining obligations during the period of negotiations; therefore, the Union was not subject to its corresponding obligations.

Whether the one-man unit rule should be applied in the above manner is theoretical here. As the Board noted, the Union's argument has no factual basis (R. 40, n. 4). The

record does show that throughout 1964, within the term of the preceding contract between the parties, AGC members had employed varying numbers of bricklayers and masons, up to approximately 10 such employees during a given month. (Tr. 45, 53-55). This is consistent with the Board's experience that in the construction industry bargaining units often must comprise employees who work intermittently for the employer. See *Trammel Construction Co., Inc.*, 126 NLRB 1365, 1366. Here, unit employment undoubtedly dipped to a low level during certain periods of the 13-year bargaining history between AGC and the Union. The parties' contractual and bargaining relationships continued uninterrupted, however, as did the statutory obligations arising from them. The situation remained the same during the period of the 1965 negotiations to modify the existing contract; it was not altered by the fortuity that the employers needed only one unit employee during that period. Compare, *N.L.R.B. v. Local 542, International Union of Operating Engineers*, 331 F. 2d 99, 106-107 (C.A. 3), and cases cited therein.[9]

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[9] In *Local 542*, the court rejected the union's contention that because no operating engineers were working for the employer at the time of the recognitional picketing, the case fell outside the limitations of Section 8(b)(7). The court stated (331 F. 2d at 106):

> To hold that 'his employees' [as stated in the Act] refers merely to current employees would bring about an anomalous situation. [Footnote omitted] A union picketing for a recognitional purpose, where the employer currently employs workers in the particular craft of the union, would be subject to the requirement that a representational petition be filed within a reasonable period of time not to exceed thirty days. Yet, if there were no current employees and only a possibility of prospective employees,

(continued)

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GLEN M. BENDIXSEN,
RICHARD S. RODIN,
Attorneys,
National Labor Relations Board.

February 1968.

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9 (continued)

the Union's recognitional picketing would be unaffected by any requirement of filing a petition with the Board, if we accept the construction that the statute applies only to current employees. It then could picket, presumably, *ad infinitum.* Such a construction would be an unreasonable interpretation of the Act.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a); * * *

* * * * *

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of wh ich building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such

labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

* * * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief of restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

INDEX TO REPORTER'S TRANSCRIPT

(Numbers are to pages of the reporter's transcript)

Board Case No. 19-CB-1059-1

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1A-1J	7	7	7
1K	8	8	8
2	23	23	24
3	24	24	24
4	33	33	34
5	35	35	36
6	39	39	39
7	40	40	—

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1	72	71	72